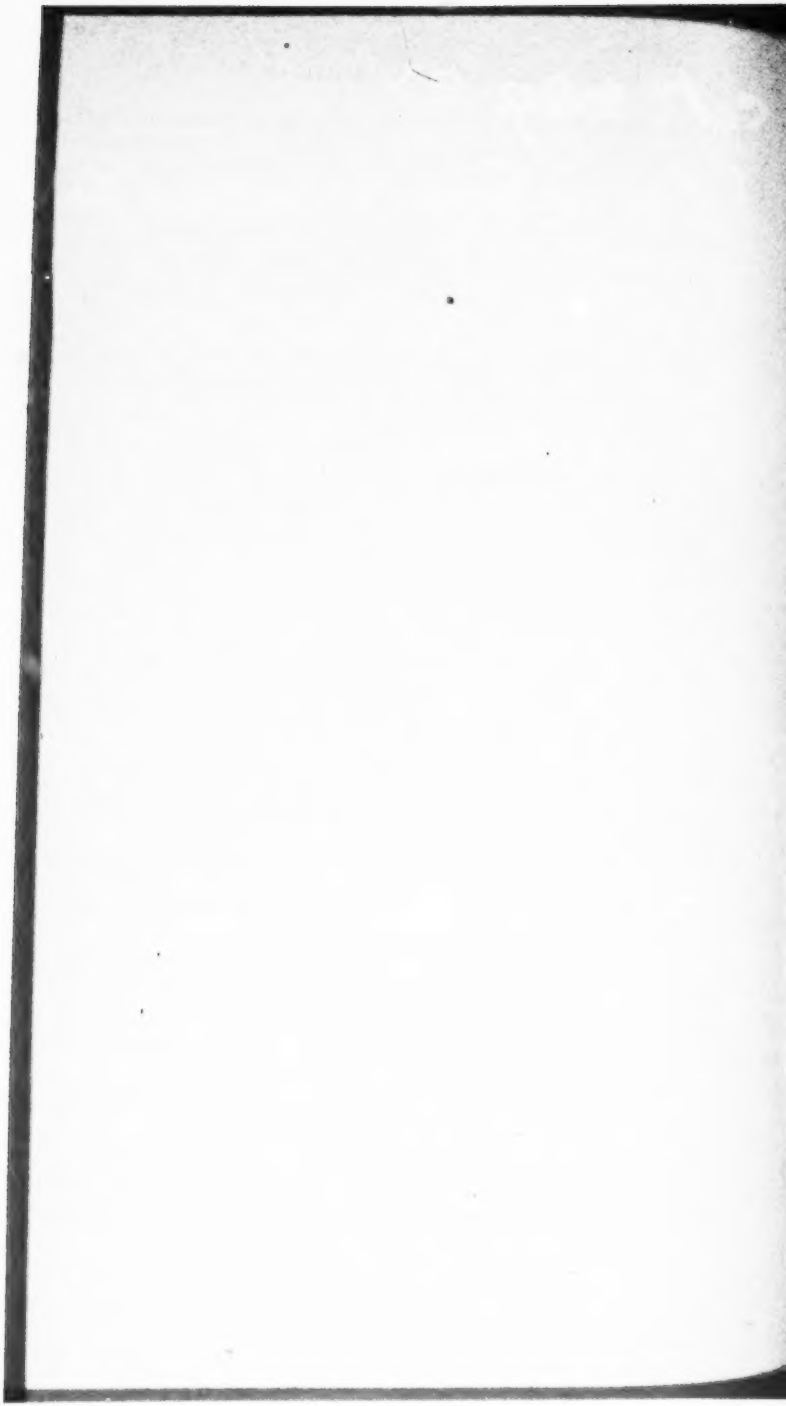


No. 289, 27

Sup. of Cases vs. Pullman's Palace Car Co.

Office Supreme Court U. S.
FILED
OCT 25 1902
JAMES H. McKENNEY
Clerk.

Filed Oct. 25, 1902.

BRIEF

Supreme Court of the United States

OCTOBER TERM, 1901.

No. ~~612~~ 289

J. W. Allen, Comptroller of the State of Tennessee

vs.

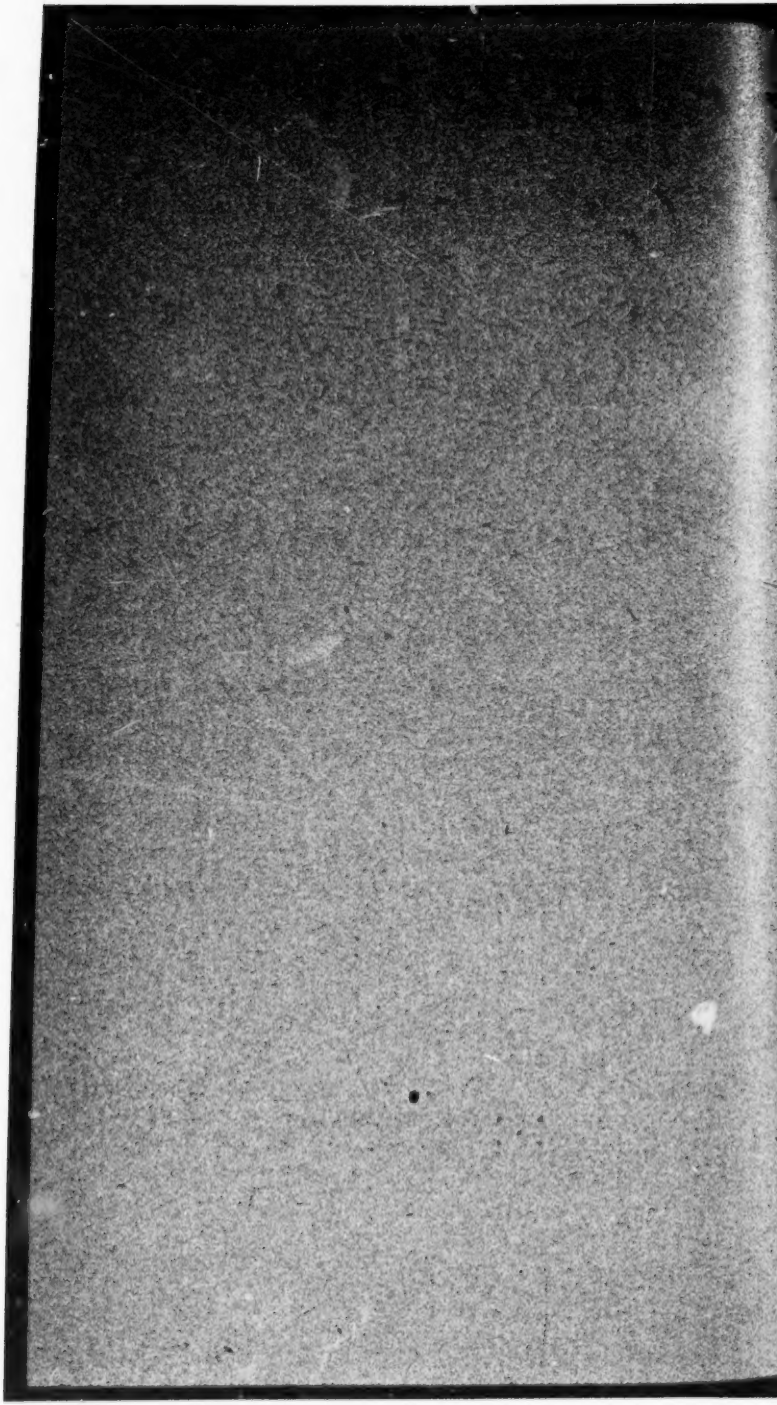
Pullman's Palace Car Company.

Brief of

CHARLES T. CATES, JR.,
Attorney-General of Tennessee.

JOHN J. VERTREES,
Counsel for Plaintiff in Error.

MARSHALL & BRUCE CO., PRINTERS.



J. W. Allen, Comptroller, etc.,

vs.

Pullman's Palace Car Company.

May it please the Court:

This is a tax case. The question involved is whether certain privilege taxes, imposed by the State of Tennessee upon sleeping-car companies, were rightfully collected from the defendant in error.

The solution of the question depends upon the validity of two statutes enacted by the Legislature of Tennessee. If those statutes are not violative of the interstate commerce clause of the Constitution of the United States, the taxes were valid and ought to have been collected; but if they violate that clause, the taxes were wrongfully exacted. The Court below, the Circuit Court of the United States for the Middle District of Tennessee, held the statutes to be unconstitutional and void, and gave judgment accordingly for $26,695.17. The State of Tennes-

see, through its Comptroller, sued out a writ of error to reverse that judgment.

So much of the case as is necessary to be known, in order to determine the questions involved, is contained in the following

STATEMENT OF THE CASE.

The State of Tennessee enacted a general revenue law in the year 1887, which, among other things, provided that—

> Sec. 4. The rate of taxation on the following privileges shall be as follows, per annum: . . .
>
> SLEEPING-CAR COMPANIES.
>
> Each company doing business in this State, on *each*[1] car per annum $500.00

By virtue of this statute, the Comptroller demanded and collected from the Pullman Palace Car Company (hereinafter called the "Pullman Company") the following taxes:

1887. 2 cars (Nashville to Memphis)	$1,000.00
1887. 1 car, proportionate business on interstate cars	500.00
1888. 2 cars (Nashville to Memphis)	1,000.00
Tax on five cars	$2,500.00
Interest, penalties, etc	$1,609.30

[1] All italics are ours.—*Counsel.*

In 1889 the Legislature of Tennessee enacted a new general revenue law, which, among other things, provided that—

> Sec. 4. The rate of taxation on the following privileges shall be as follows, per annum: . . . .
>
> SLEEPING-CAR COMPANIES.
>
> Each company doing business in this state, for one or more passengers taken up at one point *in this state*, and delivered at another point *in this state*, and transported *wholly within this state*, per annum, $3,000.00.[1]

By virtue of this statute of 1889, the Comptroller demanded and collected from the Pullman Company the following taxes:

For 1889	$3,000.00
" 1890	3,000.00
" 1891	3,000.00
Total tax	$9,000.00
Interest, costs, penalties, etc	745.50

The large amount of interest, penalties, etc., is due to the fact that these taxes were not paid until 1891 and 1892.

The Pullman Company paid under protest, and instituted suits to recover, within the time prescribed by the

[1] 1889, ch. 130, sec. 5, p. 266. The Act of 1891 is identical with the Act of 1889, and, therefore, will not be reproduced here.

laws of Tennessee; and it is entitled to recover, *if* these statutes are unconstitutional and void.

The case, by agreement, was tried by the Court without a jury, and there is consequently a special finding of facts.

THE FACTS.

The Pullman Company owns and operates sleeping-cars over numerous railroads in the United States. It runs its cars over railroads in and traversing the State of Tennessee. The contracts between the Sleeping-car and the Railroad Companies, under which these cars are run in Tennessee, in substance provide:

> That the Sleeping-car Company shall furnish the "sleepers"; and keep the beds, carpets, etc., in order; and furnish porters and conductors; and give the railroad officers passes.
>
> That the Railroad Company, on its part, shall have the cars *free* of charge; and
>
> Pay to the Pullman Company *three cents per mile* for this privilege; and supply all the light and heat and ice water for the cars; and repair all damages due to accident and casualty, regardless of its own fault.[1]

The lines of railway in Tennessee over which the Pullman Company has sleeping-cars in use under this con-

[1] Trans., 22–26.

tract, are not limited to the boundaries of Tennessee. They are long lines, traversing many States, and are known as the—

Louisville & Nashville R. R. Company;
Nashville, Chattanooga & St. Louis Railway;
Southern Railway Company;
Illinois Central Railroad Company.

Sleeping-cars are run into, and out of, and across, Tennessee on these lines. Many passengers are "through" passengers; but it is also true that a number of passengers are "taken up and carried, and put down, *within* the State" of Tennessee.[1]

One branch of the company's operations, particularly, is to be mentioned. Every night a "sleeper" left Nashville, Tenn., for Memphis, Tenn. Having arrived at Memphis, it would *remain there a day*, during which it would be cleaned. That night it would return to Nashville, and there it would *remain a day*, during which it would be cleaned. The night of that day it would leave for Atlanta, Ga., by way of Chattanooga, Tenn. A similar return "run" would be made back to Nashville, and after a day, to Memphis, Tenn.[2]

---

[1] Trans., 51.

[2] Trans., 50.

"On the nights these cars left Nashville for Memphis, and left Atlanta for Nashville, a car left *Memphis* for *Nashville*, and another left Nashville for Atlanta, selling tickets as above set out from *Memphis* to *Nashville* and *intermediate* points, and *no further;* and from Atlanta and *intermediate*" (Chattanooga, Tullahoma, Murfreesboro, etc.), points, and no further.[1]

The annual gross receipts of the Sleeping-car Company from lines running into Tennessee were about $500,000, but the receipts from "local" passengers were about $25,000 a year.[2]

Over one hundred different cars were used during the year on all these lines in Tennessee.[3]

It was conceded that the tax for the year 1887 on the two cars run exclusively between Nashville and Memphis was lawfully demanded.[4]

From the foregoing statement it will be observed—

That the Pullman Company does both an interstate and an intra-state business, at the same time and with the same cars;

That is, on any given "run" there will be passengers of these various classes:

---

[1] Trans., 50.
[2] Trans., 51.
[3] Trans., 52.)
[4] Trans., 52.

a. Passengers taken up at points in Tennessee and transported to other points in Tennessee;

b. Passengers taken up in Tennessee and transported to points beyond Tennessee;

c. Passengers taken up outside of Tennessee and transported to points in Tennessee; and

d. Passengers transported *across* Tennessee.

a represents intra-state business, and which amounts to about..... $25,000.00

b, *c*, and *d* represent interstate business, which amounts to about..... 475,000.00

Upon the facts stated, the Court below was of the opinion that all the acts were unconstitutional, and the taxes collected thereunder void; and judgment was accordingly rendered in favor of the Pullman Company for $26,693.17.

ASSIGNMENT OF ERRORS.

The Court erred—

1. In entering judgment in favor of the plaintiff and against the defendant.

2. In holding and adjudging that the taxes imposed by the State of Tennessee upon the plaintiff and demanded of it, and paid by it under protest, and which the suits were brought to recover, applied to and unduly affected the

interstate commerce in which the plaintiff was engaged, and were, for that reason, illegal and invalid.

3. In not holding and adjudging that the said taxes did not unduly affect or impose unauthorized burdens upon the interstate commerce in which the plaintiff was engaged.[1]

4. In not holding and adjudging that the taxes imposed and collected by virtue of the Act of 1887 were valid.

5. In not holding and adjudging that the taxes imposed and collected by virtue of the Acts of 1889 and 1891 were valid.

ARGUMENT.

I.

The only question in the case is a constitutional one—whether certain acts of the Legislature of the State of Tennessee are in violation of Article 1, Section 8, Sub-section 3 (the interstate commerce clause), of the Constitution of the United States.

The statutes in question are—

Acts 1887, ch. 1, sec. 5;
Acts 1889, ch. 130, sec. 5;
Acts 1891, Ex. Sess., ch. 25, sec. 5.

The Acts of 1889 and 1891 are the same, and, therefore, one of them only will be quoted here. The Acts of

[1] Trans., 63.

1889 and of 1887 are different, and will require separate consideration.

The Act of 1889 will be first considered. This Act is the general revenue law of the State of Tennessee for that year, and it (as is also the Act of 1891) is as follows:

> Sec. 4. The rate of taxation on the following privileges shall be as follows, per annum:
>
> . . . . . .
>
> SLEEPING-CAR COMPANIES.
>
> (In lieu of all other taxes except *ad valorem* tax). Each company doing business in this State, for one or more passengers taken up at one point *in this State*, and delivered at another point *in this State*, and transported *wholly within this State*, per annum, $3,000. (1889, ch. 130, sec. 6, p. 266.)

Our first proposition is, that:

II.

This Act of Tennessee of 1889 *is valid, and is not inimical to the interstate commerce clause of the Constitution of the United States.*

It will be observed that the Pullman Company did *both* an interstate and an intra-state business. "On all other railways within the State whereon sleeping-cars are operated, plaintiff (the *Pullman Company*) has, upon its

'sleepers', for compensation, *taken up*, and *carried*, and *put down*, *within* the State, passengers," is the finding of the Court as to the interstate business.[1]

It will also be observed that the Legislature of Tennessee has been exceedingly careful to impose the tax upon sleeping-car companies on the intra-state business alone, and *not* upon the interstate business done. "For one or more passengers taken up at one point in *this* State, and delivered at another point in *this* State, and transported *wholly* within *this* State," is the language of the Acts of 1889 and 1891.

Consequently the question to be determined, stated in general terms, is this: Where a sleeping-car company does *both* an interstate and an intra-state business, can a State tax the intra-state business? Or, stated otherwise: Does the fact that a sleeping-car company does an interstate business, as well as a local or intra-state business, deprive the States of the power to tax the local business?

The question presented by this case is far-reaching in its consequences. When the States were but little more than sparsely-settled agricultural communities, with slow and difficult means of inter-communication, the present question was one of comparatively little importance. But since it has come about that distance has been abridged

[1] Trans., 51.

by the railway, the telegraph, and the telephone, and the business relations of New York, and Nashville, Tennessee, become closer than those formerly existing between Nashville and Knoxville, in the same State; since it has come about that businesses are rapidly consolidating into concerns of great magnitude, the question now presented is one which must be considered from shifted points of view. Changing conditions have altered opinions, and to such an extent that this Court at a comparatively recent date has said that

> "With reference to the utterances of this Court until within a very short time past, as to what constitutes commerce among the several States, and also as to what enactments by the State Legislatures are in violation of the constitutional provision on that subject, it may be admitted that the Court has not always employed the same language, and that all of the judges of the Court who have written opinions for it may not have meant precisely the same thing." (*Fargo vs. Michigan, 121 U. S., 230–240.*)

It has more than once been declared that "the States cannot, by legislation, place *burdens* upon commerce with foreign nations, or among the several States;" but the question is, what is a "burden" in the prohibited sense?

The business of every one engaged in trade or commerce, so far as profits are concerned, must be considered

in its entirety—as a unit. That is to say: Although a trader or carrier does two kinds of business, and keeps his books so as to show the interstate and the intra-state business separately, nevertheless it is all one as to the result. If a burden be placed by Congress upon the interstate part of the business greater than it can bear, the intra-state business must bear its part of the load if the business is to continue. The burden must be lifted, the obligation paid, out of the joint receipts, before any *profit* can be declared. Upon the other hand, if such an onerous burden be imposed by a State upon the intra-state business, the interstate business must help to bear it if the business is to continue. And if a burden be placed upon *either*, though under the forms of law it be leveled at, and imposed, upon *one* only, nevertheless if it be greater than both together can profitably bear, the *business itself* must fail. In the nature of things the *business* is a unit so far as the *owner* is concerned; and that which is a "burden" upon any branch is a burden upon the whole.

In this connection, two well settled principles are to be noted. The first is, that *if* the State of Tennessee is possessed of the power to impose this privilege tax, the *amount* of the tax is a question for the Legislature of Tennessee alone to decide. The only concern of this

Court is with the validity of the tax. All else lies beyond the jurisdiction which it has.

Delaware R. R. Tax, 18 Wall, 231;
Cal. & Pac. R. R. Co., 127 U. S., 141;
Home Ins. Co. vs. New York, 134 U. S., 594;
Weston vs. Charleston, 2 Pet., 449, 466;
State Tax on Foreign-held Bonds, 15 Wall, 300, 319;
Kirtland vs. Hotchkiss, 100 U. S., 499;
Street R. R. Co. vs. Morrow, 87 Tenn., 432;
Railroad vs. Harris, 99 Tenn., 684, 709;
Jenkins vs. Ewin, 8 Heisk., 477.

The other rule to be remarked upon in this connection is, that the motives of Legislatures, and the policy, or impolicy of statutes, are things with which Courts have nothing to do.

Fletcher vs. Peck, 6 Cranch, 87;
Angle vs. Chicago, etc., R. R. Co., 151 U. S., 17;
Lynn vs. Polk, 8 Lea (Tenn.), 218, 233, 298.
Railroad vs. Harris, 99 Tenn., 708.

These rules have been adverted to for the reason that the Court below declared this tax to be "arbitrarily" imposed, without regard to the volume of the Company's business; and approved the expression of District Judge Key, in an earlier case, to the effect that the act is an attempt by mere "formal declaration" to avoid the objection of violating the Constitution.

We now recur to the principal question.

The tax assessed by this act is *not* imposed upon the interstate business. It is restricted to the intra-state business alone. It is not imposed upon any article of property used in business, but upon the business itself. It is not imposed upon the business as a whole, but upon a certain branch of the business.

If the Pullman Company did an intra-state business alone, the validity of this tax would not even be questioned. If the Company did an interstate business alone, the power of the State to tax that business could not be claimed. Now, as the Company does *both* kinds of business, and as the tax is upon one only, and upon that one which could undeniably be taxed if the Company did an intra-state business alone, it follows that one of two propositions must be true, namely:

First: That if *any part* or branch of the business carried on by any company or trader is interstate trade, *no* tax can be imposed by a State upon the other parts or branches of such business, even though they be of a local or intra-state character; or,

Second: If the business conducted by a company or trader be both interstate and intra-state in character, a State *has* the power to tax the local or intra-state branch, even though such tax be a "*burden*" upon the business,

and in that way *indirectly* a burden upon the interstate branch as well.

As already stated, traders, and companies who can command large capital, can, in these times, conduct an extensive interstate business with greater facility than a limited local business could formerly be carried on; and if it be that a branch of interstate business will protect the whole from State taxation, it will be easy for the man of large capital to establish branches in numerous States to capture the local business—adding a limited interstate branch so as to shield the whole from local taxation.

Again: The local business man can add a small branch of interstate business as an attachment, to enable him to exempt his business as a whole; and thus both classes of traders can elude privilege taxation of their business.

Upon the other hand, if it be held that a privilege tax imposed by a State, upon the *local* branch of a trader's or company's business, is a valid exercise of the taxing power, even though *indirectly* it be a "burden" upon interstate commerce, no harmful results can follow either to the State or the traders, so long as the "burden" is not so harmful as to become an *interference*.

The States protect the business and property of all those engaged in interstate commerce. Their courts are constantly occupied, at great expense, in redressing the

grievances of which they complain. The officers of the criminal law, paid by the State, are largely occupied in pursuing evil-doers, whose most pernicious activity is against the rights and property of the great transportation agencies of commerce. It would seem that the States ought to possess the power of taxation, and ought to be allowed to exercise it, so long as it does not *interfere* with interstate commerce.

Undeniably it is impossible to draw the undefinable line between the power of the State and the prohibition of the Constitution; but while the exact line of demarkation cannot be distinguished, the region wherein it lies can be located between general lines according to the following rule:

A tax may be imposed by the States upon the local or intra-state branch of a trader's or company's business, which is of both an interstate and an intra-state character, so long as it is *restricted* to the intra-state business, and does not amount to a regulation of the whole.

It is permissible for the States to tax personal *property* employed in interstate commerce like other property within its jurisdiction.[1] Such a tax is a "burden" upon the interstate commerce in which the cars are used, but it

[1] Pullman Car Co. *v.* Penna. 141 U. S., 18, 23; Am. Ref. Transit Co. *v.* Hall, 174 U. S., 70.

is not *such* a burden as to so interfere that it amounts to regulation.

It is permissible for the States to tax the *franchises* of a corporation engaged in interstate commerce.[1] Such a tax is a "burden," but it is not such a burden as to amount to a regulation of interstate commerce.

The tax now in question was not imposed upon either the property or the franchises of the Pullman Company. It was imposed upon business—upon a part of the company's business. Is a tax upon that *part* of the business only which is local forbidden?

The case of *Leloup vs. Port of Mobile* (127 U. S., 640) was decided on the 14th day of May, 1888. It appears that the municipal corporation known as the Port of Mobile, in the State of Alabama, passed an ordinance to the effect that the license tax for the fiscal year should be fixed as follows: "On Telegraph Companies, $225." The Western Union Telegraph Company was a foreign corporation doing both an interstate and an intra-state telegraph business in the city of Mobile. It refused to pay the tax upon the ground that such tax was a regulation of interstate commerce, and therefore void. In this contention,

[1] Mass *v.* West. U. Tel. Co., 141 U. S., 40 (1890).

the company was sustained. The Court, through Mr. Justice Bradley, said:

> The question is squarely presented to us, therefore, whether a State, as a *condition* of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages, from one State to another, and between the United States and foreign countries. . . . Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can be done, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. (127 *U. S.*, 645.)

But the Court also said:

> "It is urged that a *portion* of the telegraph business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the *internal business*, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the *entire* operations of the Company." (127 *U. S.*, 647.)

Here was a plain intimation that if the tax had been restricted to the internal business of the telegraph company alone, it would have been sustained. This intimation is

developed into an enunciation in *Ratterman* v. *West. Union Telegraph Company* (127 U. S., 411), decided the same day upon which was decided *Leloup* v. *Port of Mobile*. In *Ratterman vs. West. Union Tel. Company* it appeared that the State of Ohio imposed a tax upon telegraph companies according to the amount of their gross receipts. The Western Union Telegraph Company filed a report in accordance with a requirement of the statute (but under protest), showing that its gross receipts in Ohio were $175,214.88, divided as follows: from interstate business, $142,158.18, and from intra-state business, $32,056.70. The Ohio *statute* did *not* make any distinction between the two kinds of business. It imposed a single tax upon the gross receipts. The Court held the tax to be valid as to the receipts from the intra-state business, and void as to those from interstate business.

Among other things the Court said:

> "Neither are we of opinion that there is any real question, under the decisions of this Court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that so far as it was only upon commerce wholly within the State it was valid."

And the Court cited with approval the case of *The State Freight Tax*, 15 Wall., 232, for the proposition that—

> "Where the subjects of taxation can be separated, so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the Court will act upon this distinction, and will restrain the tax on interstate commerce, while permitting the State to collect that arising upon commerce wholly within its own territory."

And in conclusion the Court said:

> "We answer the question, in regard to which the judges of the Circuit Court divided in opinion, by saying that a *single* tax assessed under the Revised Statutes of Ohio, upon the *receipts* of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed *in gross* and without separation or apportionment, is *not* wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce." (*Pp. 427-8.*)

Next is the case of *Western Union Tel. Co.* vs. *Alabama*, 132 U. S., 472 (1889). In this case it appeared that a law of the State of Alabama imposed a tax on the gross receipts of every telegraph company derived from "business done in this State." It required reports to be made to the Assessors, showing the amount of such

receipts. The Company made a report, showing its gross receipts from business done *wholly* within the State of Alabama. The Board of Assessors required it to make an additional report, showing all receipts from all messages, whether carried wholly or partly within the State; and assessed the Company for taxation upon this latter amount.

The Supreme Court of Alabama construed the statute to be as the Assessors construed it, and sustained the tax. Nevertheless this Court, while reversing the case, and holding the tax to be void as to the interstate messages, held it to be valid as to the messages included in the first return, and remanded the case to be proceeded with accordingly.

Pacific Express Company vs. Seibert, 142 U. S., 339 (1892), was a case involving a tax imposed upon express companies by the State of Missouri. The statute imposed the tax upon the receipts from "the business done within the State." The Circuit Court held that this statute did not interfere with the Company's interstate business, and that if it were otherwise, inasmuch as the receipts *could be separated*, the tax would be good as to all business done wholly within the State.[1] The judgment was affirmed on appeal. This Court held that the statute, properly construed, should be restricted to intra-state business, and that the tax consequently was valid.

[1] 44 Fed. Rep., 310 (1890.)

In *Osborne vs. Florida*, 164 U. S., 650 (1896), it appeared that a statute enacted by the State of Florida imposed a license tax on all express companies "doing business in this State." As will be observed, it was imposed on *all* companies, without regard, so far as the *expressed* terms of the statute are concerned, to the nature of the business done; without regard to its local or its interstate quality. But under well settled rules of interpretation the Supreme Court of Florida *construed* the statute to relate to local business alone. That construction was, of course, accepted by this Court, and (being accepted) the tax was sustained. And Mr. Justice Peckham said:

> "In other words, this statute as construed by the Supreme Court of Florida does *not* exempt the express company from taxation upon its business which is *solely* within the State, *even though* at the same time the company may do a business which is interstate in its character, and that as to the latter kind of business, the statute does not apply to or affect it.
>
> "As thus construed, we have no doubt as to the correctness of the decision that the Act does not in any manner violate the Federal Constitution." (164 *U. S.*, 654.)

Also:

> "It (*the company*) can conduct its interstate business without paying the slightest heed to the Act

because it does not apply to, or in any degree affect, the company in regard to that portion of its business which it has the right to conduct without regulation from the State.

"The company in this case need take out no license and pay no tax for doing interstate business, and the statute is, therefore, valid."

POSTAL TELEGRAPH-CABLE COMPANY VS. CHARLESTON.
152 U. S., 692 (1893).

This case also presented the direct question.

The telegraph company was a corporation of the State of New York, with an office in Charleston, South Carolina. It also had numerous offices throughout South Carolina and in other States.

The city of Charleston imposed a privilege tax of $500 per annum on every telegraph company or agency "*for business done exclusively within Charleston.*"

This Court sustained the tax, holding that it was not a regulation of interstate commerce.

The cases of *Western Union Telegraph Company vs. Massachusetts*, 125 U. S., 530; *Leloup vs. Port of Mobile*, 127 U. S., 640; *Telegraph Company vs. Texas*, 105 U. S., 460; *Ratterman vs. Western Union Telegraph Company*, 127 U. S., 411; *Western Union Telegraph Company vs. Alabama*, 132 U. S., 472, and *Pacific Ex-*

press Company vs. Seibert, 142 U. S., 339, were cited by the Court, and the conclusion announced that they needed "no reinforcement," and that "their conclusions are readily applied to the case in hand."

These, we respectfully submit, are conclusive of the question.

Independently of the case of *Postal Telegraph-Cable Company vs. Charleston*, 153 U. S., 692, a number of the State Supreme Courts have arrived at the same conclusion.

TENNESSEE—Railroad vs. Harris, 99 Tenn., 685, 710.

FLORIDA—Osborne vs. State, 33 Fla., 162; s. c., 25 L. R. A., 120; 39 Am. St. Rep., 99.

NORTH CAROLINA—State vs. French, 109 N. C., 722; s. c., 26 Am. St. Rep., 590.

NEW JERSEY—New Jersey vs. Board, 55 N. J. Law, 529; s. c., 25 L. R. A., 134.

NEBRASKA—W. U. Tel. Co. vs. Fremont, 43 Neb., 500; s. c., 26 L. R. A., 706; York City vs. Chicago, etc., R. R., 56 Neb., 578.

UTAH—Ogden City vs. Utah, 17 Utah, 76.

VIRGINIA—W. U. Tel. Co. v. Bright, 90 Va., 70.

ALABAMA—Ala., etc., R. R. vs. Bessemer, 113 Ala., 668.

OHIO—Express Co. vs. State, 55 Ohio St., 69.

The reason is, that a tax upon that part or branch of the business, or the receipts from a business which is

intra-state, is *not* a regulation of interstate commerce; neither does it so *hamper* or *interfere* with interstate commerce as to "amount" to regulation.

When this Court held that a State tax upon personal property used in interstate commerce was not forbidden as a regulation of interstate commerce, and that a State tax on the franchises of a company engaged in interstate commerce was not forbidden, it was obliged to follow that a State tax upon the receipts from local business, or upon that part of the business which is local, could not be regarded as a "regulation" of interstate commerce.

This doctrine was announced because, logically, a privilege tax imposed by a State upon business done wholly within its limits is *not* in fact a regulation of such interstate business as the taxpayer happens to be doing at the same time. The one thing is not the other. Neither is the "burden" so *direct*, or the interference so serious, as to justify the declaration that in effect it "amounts to regulation."

Moreover, public considerations, which are ever to be regarded, do not commend such an interpretation. Upon the contrary, the *protection* required by these companies, and actually afforded by the States, demands that they should bear their just proportion of the expense incurred in so doing.

This has been more than once expressed by this Court.

"Usually such corporations"—

Says Mr. Justice Shiras—

"Though organized under the law of one State, make their profits by doing their business in several, or all, of the States, and while so doing receive the *protection* of their laws. When the tax payers of one State perceive that they are subjected to competition by the importation of articles made in another, or that they are contributing continually to the prosperity of foreign corporations, what more natural than that they should demand that some share of the public burdens should be put upon such corporations? The difficult task of the law-maker is to meet that *natural* and *proper* demand without infringing upon the freedom of interstate commerce, or depriving those engaged therein of the equal protection of the laws." (*Am. Ref. Tr. Co. vs. Hall*, 174 *U. S.* 75.)

"Corporations and companies engaged in interstate commerce"—

Said the Chief Justice in *Adams Ex. Co. vs. Ohio*—

"Should bear their proper proportion of the burdens of the governments under whose *protection* they conduct their operations, and taxation on property collectible by the ordinary means does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of the government." (165 *U. S.*, 221 (1876.)

The result of the cases is stated by Prentice and Eagan in their treatise, entitled "Commerce Clause of the Federal Constitution,"[1] in these words:

> "The imposition of heavy taxation upon domestic commerce may, of course, increase the expense of interstate transportation. Carriers are generally compelled to have their agencies and officers, and to maintain property within the State through which they operate, whether the business conducted be interstate, or intra-state and domestic. If, as a result of State legislation, their operation be confined to interstate transportation, their business will be burdened with an expense which would otherwise be divided between the two classes. *No case can be found, however*, in which State regulation or taxation of purely domestic commerce has been declared invalid for that reason."

While taxes are said to be imposed upon a man's property or business, or a company's property or franchises or business, they are, after all, imposed upon the tax payers personally. This tax, now in question, was imposed upon the *Company*, but for, and because of, a certain business.

It is obvious that one of two things must be true: (1) It must be true that *no* tax can be imposed by a State upon local business where the person from whom

[1] Page 236.

the tax is demanded happens to do interstate business at the same time; (2) or such a tax *can* be imposed without violating the Constitution of the United States. If the former be true, States, and the citizens of the respective States, must give such person business opportunity and protection, *free* of any tax or charge.

Such appears to have been the view taken of this case by the Court below.

The other view is that which we understand this Court to have announced, and which sustains the validity of the tax now in question, imposed upon the Pullman Company by the State of Tennessee.

The Court below appears to have been controlled by two opinions announced a long time ago by the Circuit and the District Courts of Tennessee. Those cases will now be briefly considered.

United States Express Co. vs. Allen, Comptroller, 39 Fed. Rep., 712, is the first. It was decided by District Judge Key in 1889.

The general revenue law of Tennessee of 1889, already referred to, imposed a tax on express companies upon their local business alone. The provision with respect to express companies is in effect the same as that relating to Sleeping-car Companies. The tax is expressly restricted

to intra-state business. "For one or more packages taken up at one point in this State and transported to another point in this State," is the language of the Act.

The United States Express Company filed a bill in equity to enjoin the collection of this tax, on the ground that it was void as a regulation of interstate commerce. Judge Key held that it was void, and ordered the injunction to issue. His logic, in substance, is this:

> That the tax bears as "heavily" on the *Company* as if it were imposed upon all its business, for the reason that if it were to cease to do a local business the interstate business would be burdened with fixed charges which otherwise would be divided between the two classes of business; that "perhaps" this does not render the tax invalid, but that, after all, the provision is a mere "device to fasten the tax upon the Company;" that the tax is not regulated by the amount of the business, but by the length of the line, which cannot be the standard.

That which the learned judge urges as a fatal objection to the tax, could with equal propriety be urged against *any* tax which can be imposed, and, being so broad, ceases to be a valid objection at all.

For, after all, every tax law is a "device" to fasten the tax upon the taxpayer. A tax upon the *property* of a corporation must be borne by the company; and if a

tax be imposed upon one branch of any business of a company with fixed charges, and that branch be discontinued, the other branch will then have to bear the whole expense thereafter.

Privilege taxes *ought* probably to be regulated by the amount of business, but they do not have to be so regulated. The Legislature, if it has power to impose a privilege tax at all, can fix the amount at discretion, unless, indeed, it be confiscatory, of which something will be said later on.

We respectfully submit that the opinion is not entitled to weight, for the reason that it antedates the opinions of this Court, and is inconsistent with them, and is not logically exact.

The case was brought to this Court, and here reversed; but it was reversed upon the ground that no case was shown for *equitable* relief. The merits of the question were not considered.[1]

The opinion of Judge Jackson, referred to by Judge Clark, presumably is the opinion rendered by him in *Pickard vs. Pullman Palace Car Company*, which was removed to this Court, and the opinion in which, delivered by this Court, is reported in 117 U. S., 34.

[1] 139 U. S., 591, 658.

The case was this: Tennessee passed an Act declaring "the running and using of sleeping cars" on railroads in Tennessee to be a *privilege*, and imposing a tax of $50.00 upon every car so run and used, and making it unlawful to run a sleeping-car without paying the tax.

This Court held the tax to be void, as a regulation of interstate commerce.

It will be observed that the "running and using" of every car was declared to be a privilege, and that the tax was imposed upon every car used, without discrimination as to its *use*. So far as the statute was concerned, the use was an *unit*, regardless of the nature of the commerce in which the car might be used. Practically, every moment of *use* was most probably in both branches of the business, since local and "through" passengers habitually use and occupy the same car at the same time. While different seats are occupied, the car-use by the company is the same. Where, as in that case, the tax is on the *running* and *using* of cars, it must be paid, regardless of the nature of the commerce in which the car is used. Necessarily, as the Court afterward said in *Pullman Palace Car Company vs. Pennsylvania*, when explaining the case, it was a tax "upon the right to carry on the business at all," and therefore was a *direct* burden upon

the commerce as an unit itself.[1] As Mr. Justice Blatchford said:

> "The tax was a *unit*, for the privilege of the passenger and all its accessories. No distinction was made in the tax between the right of transit as a branch of commerce between the States and the sleeping and other conveniences which *appertained* to a transit in the car. *The tax was really on the right of transit*, though laid wholly on the owner of the car. So, too, the service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, *so far as it was engaged in interstate commerce*, was not taxable by the State of Tennessee."

In the case now under consideration, the tax is *not* upon the running and using of the cars; neither is it upon the business or commerce, as an unit, in which the car is employed. It is imposed upon, and expressly restricted to, that *part* of the commerce or business which is intrastate.

As we view the case, *Pickard vs. Pullman Southern Car Company* is irrelevant. Moreover, the cases which have already been referred to, decided since 1886 (when that opinion was delivered), are at variance with the *inter-*

[1] 141 U. S., 25.

pretation that counsel for plaintiff in error now seek to place upon it; and if it means what *they* say, it has, in effect, been repeatedly overruled.

When objection is made by sleeping-car companies to this tax, it naturally occurs to the mind of the hearer to suggest that they can avoid it altogether by confining themselves to through, or interstate, business. If the tax is oppressive, let them cease to do an intra-state business. But to this suggestion it was answered below, and that answer will doubtless be repeated here, that in Tennessee this course is not open to the companies, for the reason that they are public carriers, who are *obliged* to receive all who come; and it is said to be most oppressive, that they should be obliged to carry "local" passengers, and at the same time be called upon to pay an onerous tax; that they ought at least to have the privilege of declining to do a local business. This contention, however, ignores the laws of Tennessee. It is true that in the case of *Pullman Palace Car Company vs. Gavin*, 93 Tenn., 53, the Supreme Court of the State said that a sleeping-car company is neither an inn-keeper nor a common carrier. The question in that case was as to the liability of the Company for money stolen from a passenger while he slept. To avoid an application of the old,

exacting, common-law rule applied to common carriers, the Court said that sleeping-car companies were not common carriers—meaning thereby that they were not such common carriers as were known to the common law. But having said what they were not, and realizing that it ought to be stated what they *were*, or at least that *something* should be said, the Court added that they had been facetiously *called* "flying nondescripts." Whatever sleeping-car companies may have been *called*, the fact is they are carriers of passengers for hire. They are, of course, not the "common" carriers known to the common law, but they are a new species of carrier, developed in modern times. In *Pickard vs. Pullman S. C. Co.*, 117 U. S., 47, this Court said:

> "The fare paid by the interstate passenger to the *railroad* company and that paid to the plaintiff (The Pullman Company), added together were merely a charge for his *conveyance* in a particular way, and there was really but one charge for the transit, though the total amount paid was divided among two recipients. The service was a single one, of interstate transit, with certain accommodations for comfort, and what was paid to the plaintiff was part of a charge for the conveyance of the passenger."

That describes a public carrier; and if a sleeping-car company, operating its cars, is not a "carrier of passengers," what is it?

Even though it be said, and by a court, that a thing is a "flying nondescript," it is not thereby said that a "flying nondescript" may not be a carrier of passengers for hire. Suppose an automobile were not *called* an automobile, but a "flying nondescript," would that imply that it could not be so used as to be a carrier of passengers for hire?

Those people in Tennessee who control it, have always been averse to an association of the white and black races. In order that such association might not be enforced in public places, a law was enacted in 1875, which provided that "no keeper of any hotel, or public house, or *carrier of passengers* for hire, or conductors, drivers, or employes of such carrier, or keeper," shall be under any obligation to entertain, carry, or admit any person to his "house, hotel, carriage, or *means of transportation*, or place of amusement;" and it is the law to this day.[1]

As a consequence, no "carrier of passengers" is *obliged* to carry either a "local" or a "through" passenger in Tennessee; and if a sleeping-car company is a "carrier of passengers," of course *it* is not; but it can decline to carry either classes or individuals.

[1] Acts 1875, ch. 130; Code of Tennessee, Shannon, section 3046. This is a valid statute. 9 Baxter (Tenn.), 584.

In the case of *Railroad Co. vs. Katzenberger*, 16 Lea (Tenn.), 380, the question was whether the *Railroad Company* was liable for the loss of the baggage of a passenger in a sleeping-car. The Supreme Court of Tennessee held that it was liable, upon the ground that "it must respond to its obligations as a carrier of passengers, whether it carry on the sleeper of the Pullman Car Company, or in its own coaches provided by itself." According to this view, the Railroad Company is the responsible carrier, and certainly it cannot be said by anyone that a railroad company is not a "common carrier." The language of the statute is, no "carrier of passengers for hire" shall be obliged to admit any persons to his "carriage," or to his "means of transportation."

Whether the Railroad Company be considered the carrier, from one point of view, and the Sleeping-car Company, from another, is immaterial under the statute. The carrier controlling the "means of transportation" is permitted to decline to receive and carry.

The objection, viz.: That the Company ought not to be *obliged* to carry, and then be heavily taxed for engaging in the business, is not well taken, aside from the Act of 1875. Telephone and telegraph companies are not allowed to refuse to receive and transmit messages, yet

the fact that they are required to serve all who come, has never been understood to denude the State of the power to tax them. Public mills must grind in the order in which the grists come. The tolls and charges of millers, bakers, carriers, telephone and telegraph companies may be, and often are, regulated and fixed by law; but this fact has never been understood to have the effect to deprive the State of the power to tax them.

For these reasons we submit that the statutes hereinbefore mentioned (called the Acts of 1889 and 1891) are valid, and the taxes imposed thereby are not regulations of inter state commerce.

We come now to the Act of 1887:

III.

The Act of Tennessee of 1887 is not inimical to the interstate commerce clause of the Constitution of the United States, and therefore is valid.

The act of 1887 is as follows:

> Sec. 4. The rate of taxation on the following privileges shall be as follows: . . .
>
> SLEEPING-CAR COMPANIES.
>
> Each company *doing business in this State*, on each car, per annum.....$500.00

The question is one of construction. But before proceeding to construe this statute, there are certain rules of interpretation which should be referred to as guides.

They are—

1. *General* words in an act should not be so construed as to give an effect to it beyond the legislative power, and thereby render the act unconstitutional; but if it be possible, a construction shall be given to it that will render it free from constitutional objection. And the presumption is that the Legislature intended to enact a law within its powers.[1]

2. If a statute is fairly susceptible of two constructions, that one will be adopted which will avoid the effect of unconstitutionality, even though it may be necessary, for this purpose, to disregard the more usual or apparent import of the language employed.[2]

3. In making the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should *not* be allowed to control *construc-*

[1] Grenada *vs.* Bragden, 112 U. S., 269; Marshall *vs.* Grimes, 4 Miss., 27, 31; U. S. *vs.* Sanges, 48 Fed. Rep., 77, 91.

[2] Parsons *vs.* Bradford, 3 Peters, 433; Black on Inter. Laws, 94; Railroad *vs.* Harris, 99 Tenn., 687, 704; Suth on Stat. Const., sec. 332, citing cases from fourteen States.

tion, in arriving at the true *intention* and *effect* of state legislation.[1]

4. Tax laws, and other laws, general in character, enacted to further important *public* interests, should be construed with liberality, so as to carry out the intention of the Legislature.[2]

This statute was passed on the 25th day of March, 1887, and with the knowledge that the State could not impose any tax upon sleeping-car companies for doing interstate commerce business in Tennessee. Tennessee, very recently, had been emphatically reminded of this rule by the decision of this Court on the first day of March, 1886, in Comptroller Pickard's case.[3]

It may therefore be certainly *presumed* that the Legislature did not *intend* to impose this tax upon sleeping-car companies for doing an interstate business in Tennessee.

Is the language in which the Act is phrased such as to preclude the Court from giving to it that construction which apparently must have been intended?

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[1] Postal Telegraph-Cable Company *vs.* Adams, 155 U. S., 700.

[2] Black on Int. Laws. 325. *Silver vs. Ladd*, 7 Wall, 219, is an illustration of this rule. There a statute allowing so much land to a "married man" and so much to a "single man" as a homestead, was held to include an unmarried woman.

[3] 117 U. S., 34.

Is the language such that the Act cannot be held to be constitutional and must be held to be unconstitutional and void?

As matter of fact, the business which a sleeping-car company may do in any State, *may* be—

(*a*) "Through" or interstate business;
(*b*) "Local" or intra-state business;
(*c*) Both through and local business.

The local business may be taxed by a State, but the through business cannot. The Pullman Company was doing both through and local business in Tennessee. The question therefore is one of interpretation. Whether the statute which taxes the Company for "*doing business in this State*," taxes it for doing, and taxes it upon, local business *only;* or also for doing, and upon, "through" business? If limited to the former, the statute is valid; if extended to the latter, it is void.

Our position is that the statute should be interpreted as if it read: "Each company doing (*intra-state*) business in this State, on each car (*employed therein*), per annum, $500.00."

This interpretation is in accordance with the general rules above mentioned, and decisions which have been made.

These decisions are—

OSBORNE *vs.* FLORIDA.

33 Fla., 162; S. C., 164 U. S., 650;
25 L. R. A., 120; 39 Am. St. Rep., 99.

The State of Florida passed a revenue act, which provided that a prescribed tax should be paid by all express companies "doing business in this State." It was insisted for the Company, that this language was so broad as to impose the tax upon all express business. It was, however, held otherwise. The statute was *construed* to impose the tax upon the companies for doing local, or intrastate business only, and so construed it was sustained. Such being the construction placed upon the statute by the Supreme Court of Florida, the judgment was sustained by this Court.[1]

The language of the Florida and Tennessee statutes are the same.

PACIFIC EXPRESS COMPANY VS. SEIBERT.

142 U. S., 339 (1892).

The State of Missouri imposed a tax on express companies for all sums earned or charged, for "the business done within the State." The Pacific Express Company in point of fact, did both local and through business,

[1] 164 U. S., 650.

within the State; but the Circuit Court held that the words "business done in the State," *meant* business *begun and ended* in the State, or intra-state business. That Court also held that even if the act should be construed to embrace the earnings from *both* local and through business, the act would still be good, because these earnings *could be separated*, and the tax be restricted to the local branch of the business.[1]

This judgment was affirmed on appeal.

This Court said:

> "The question on this point, therefore, is narrowed down to the single inquiry, whether the tax complained of in any way bears upon or touches the interstate traffic of the company, or whether on the other hand, it is confined to its *intra-state* business. We think a proper construction of the statute confines the tax which it creates to the *intra*-state business, and in no way relates to the interstate business of the company. The act in question, after defining in its first section what shall constitute an express company, or what shall be deemed to be such in the sense of the act, requires such express company to file with the State Auditor an annual report 'showing the entire receipts for business done *within this State*' of each agent of such company doing business *in this State*, etc., and further provides that the amount which any express company pays 'to the railroads or steamboats *within this State* for the transportation of their

[1] 44 Federal Reporter, 310, 316.

freight *within this State*' may be deducted from the gross receipts of the company on such business; and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged 'for the business done *within this State*,' etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other States and the State of Missouri, expressly limit the tax to receipts for the sums earned and charged for the *business done within the State*. This positive and oft-repeated limitation to business done within the State, that is, business begun and ended within the State, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. 'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the Court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed does not in any manner interfere with interstate commerce."

In *Ratterman vs. Western Union Telegraph Company*, 127 U. S., 411, a tax imposed by a statute of Ohio, upon the "gross receipts" of a telegraph company, was sustained. The *statute* made no distinction on its face, between receipts from local, and from interstate, business. Nevertheless it was sustained, for the reason that the

receipts could be, and in point of fact were, separated; and (under the rules of interpretation already announced) it was held that the statute *meant* receipts from intrastate business.

Such was the holding also in *Western Union Telegraph Co. vs. Alabama*, 132 U. S., 472 (1889). The State of Alabama imposed a tax upon the gross receipts of telegraph companies derived from "business done in this State." The tax was sustained on the ground that it *meant* business done *wholly* within Alabama.

MAINE VS. GRAND TRUNK RAILWAY,
142 U. S., 217 (1891).

The State of Maine enacted a statute, which provided that every railroad company, whether wholly or partly within the State, should pay "an annual excise tax for the *privilege* of exercising its franchises in the State." The tax was fixed at a certain per cent. of the *gross* earnings, and when the railway was partly outside the State, the tax should be apportioned according to the mileage within the State.

The Grand Trunk Railway Company was a corporation of Canada, operating a railroad which traversed the State of Maine.

The Court said there could be no question as to the power of a State to impose an excise tax upon the defendant for the privilege of exercising its franchises within the limits of the State.

And the Court further said that "as the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State, in its judgment, may deem most conducive to its interests or policy." [1]

Fairly and properly interpreted, this Act of 1887, passed by the Legislature of Tennessee, is to be interpreted as if it *expressly* restricted the tax to business done *wholly*—that is, begun and ended—within the State of Tennessee. So construed, it is, in this respect, the same as the Acts of 1889 and 1891.

But a difference does exist, which is to be noted here. The Acts of 1889 and 1891 fixed the tax at a round sum —$3,000 per annum upon the intra-state business, regardless of the volume of business done. The Act of 1889 measures the tax by the number of cars employed. The tax is imposed (by this Act of 1887) on the Company for

[1] This case has been several times approved: Post. Tel. Co. vs. Adams, 155 U. S., 609; Ashley vs. Ryan, 153 U. S., 446; Ficklin vs. Shelby Co., 145 U. S., 23; N. Y. R. R. vs. Penn., 158 U. S., 440.

the intrastate business done, but it is determined by the number of cars used. Over one hundred cars were used in Tennessee on all the railroad lines every year,[1] but they were employed in all branches of the business. Two cars were used constantly between Memphis, Tennessee, and Atlanta, Georgia, by way of Nashville, Tennessee, which cars would run so as to *lie over a day* at Nashville, and at Memphis, every trip—thus in effect, as we insist, making Nashville and Memphis in Tennessee the termini of the "run."[2]

The Comptroller determined that the Company was running two cars regularly in local business, and that the local business done on the through cars was "equivalent," on the average, to *one* car. Accordingly he assessed the Company as follows:

Nashville to Memphis,	1887, 2 cars	$1,000.00
Nashville to Memphis,	1888, 2 cars	1,000.00
Nashville to Chattanooga,	1887, 2 cars	1,000.00
Nashville to Chattanooga,	1888, 2 cars	1,000.00
One car for 1887 (*averaged*)		500.00
Total for two years		$4,500.00

Trans., 52.

This method of averaging is well recognized. Where the specific items of property—like cars—are constantly

[1] Trans., 52.
[2] Trans., 51.

changed and shifted according to the exigencies of the business, the number to be taxed may be *averaged*.

American Refrigerator Co. vs. Hall, 174 U. S., 70;
Union Refrigerator Co. vs. Snyder, 177 U. S., 149.

The *effect* of the tax upon the Pullman Company is not revealed. It *is* shown that the gross receipts of the Company in Tennessee from its interstate business are about $475,000.00 per annum, and the receipts from local business about $25,000.00 a year. Over 100 cars are employed and only *five* assessed (for 1887–1888) as doing the local business. This proportion is just. It is also shown that the Pullman Company by contract required the railroad companies to furnish all ice and fuel; to repair all injuries to cars, regardless of fault; to haul the sleepers *free;* and to pay the Sleeping car Company *three cents per mile* for the privilege of doing so. (Trans., 22–26.) It is not even intimated in the record that the tax is *interfering* with the Company, or devouring its profits. The Company has been careful not to disclose the profits made, even from intra-state business.

It is clear from the facts that the contribution which these statutes demand shall be made, to bear the burdens of public expense, are comparatively light and unimportant. Consequently the question is merely one of the

power of the State to tax the local business of a company, which *also* does interstate business.

It is settled, as we think, that the power exists. There are many reasons why it should, and none why it should not. Property, franchises and business may be taxed; why may not that *part* of the business which, if standing alone, could be certainly taxed, be taxed also, even though the company doing the business happens to be at the same time doing interstate business, which cannot be taxed?

IV.

The case then comes to this: The Pullman Company does a business which is partly of a local, and partly of an interstate character. The State of Tennessee has imposed a privilege tax upon that part of the business which is local or intra-state. The interstate part of the business is not taxed at all.

It is neither claimed, nor attempted to be shown, that the tax is so onerous as to be an interference with the Company's business. It is neither claimed nor attempted to be shown that the tax is grossly disproportionate even to the profits derived from local business taxed. It is neither claimed nor attempted to be shown that the tax

is unequal with respect to other businesses and companies similarly situated. This being the case, we respectfully submit that the judgment below should be reversed. For, as said by Chief Justice Raney of the Supreme Court of Florida in *Osborne vs. State* (33 Fla., 162):

> "It is not to be doubted that under our statute,[1] any citizen of the State or of any other State, or any body corporate of either, that should enter upon the express business in this State, proposing to confine itself to local, or State business, or actually doing so, would be subject to all the provisions of the statute; and we cannot see how it can be, that an engagement by any such person, natural or artificial, in local business can be relieved from the provisions of the statute by an engagement at the same time in interstate commerce business; and how his engagement in the latter business can make the statute inapplicable to the other.
>
> Is it true that the merchant who may be doing a large local business, can exempt himself from the statute by the fact that he may also do a regular business with customers in other States, to whom he sells and ships goods? We do not think that anything but interstate and foreign business, or business with the Indian tribes, is protected by the clause in question, or that that clause is the basis for interfering with a State's dominion over its own commerce, or for prescribing the mere form of its legislation as to its own affairs."

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[1] For statement of the case, see ante, page 41.

If such a tax were so onerous as to be destructive of the whole business, an altogether different question would be presented. Is the power of a State to tax *unlimited?* The question is one not necessary to be answered here.

We respectfully submit that the judgment of the Court below is erroneous, and that it ought to be reversed.

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